FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

UNILOC 2017, LLC	§	CIVIL CASE NOS. 2-18-cv-00491, 492,
Plaintiff,	§	493, 494, 495, 496, 497, 499, 500, 501,
V.	§ §	502, 503, 504, 548, 550, 551, 552, 553
GOOGLE LLC, Defendant.	§ 8	FILED UNDER SEAL
Defendant.	8	JURY TRIAL DEMANDED

RESPONSE OPPOSING GOOGLE LLC'S MOTION TO DISMISS FOR LACK OF STANDING AND IMPROPER VENUE¹

¹ Because this response contains voluminous exhibits, all of which are identical in each of the 18 filings, Uniloc is uploading the exhibits only to Case No. 2:18-cv-00548 to reduce the burden on Court and party resources. Cites to Uniloc's exhibits herein refer to the exhibits attached to Uniloc's response in the 548 case. Uniloc is serving the exhibits on counsel in all 18 cases.

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INTRODUCTION

Google has filed motions to dismiss in multiple cases filed by Uniloc 2017 LLC ("Uniloc 2017") on November 17, 2018 (the "November Cases")¹ and December 30, 2018 (the "December Cases").² To reduce the burden on the Court and the parties, this response addresses each of Google's motions in one paper.³

¹ The November Cases or "first wave" cases are 2:18-cv-00491 – 504.

² The December Cases or "second wave" cases are 2:18-cv-00548 – 554.

³ Uniloc cites to Google's motions collectively as "MTD" herein. Unless otherwise stated, cites to exhibit numbers or page numbers in Google's motion refer to the motion filed as Dkt. 106 in case 2:18-cv-00491.

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Google's motion to dismiss for improper venue should be denied because Google has committed acts of infringement in this District and has a regular and established place of business in this District.

I. FACTUAL BACKGROUND

I.	FACTUAL BACKGROUND

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II.			

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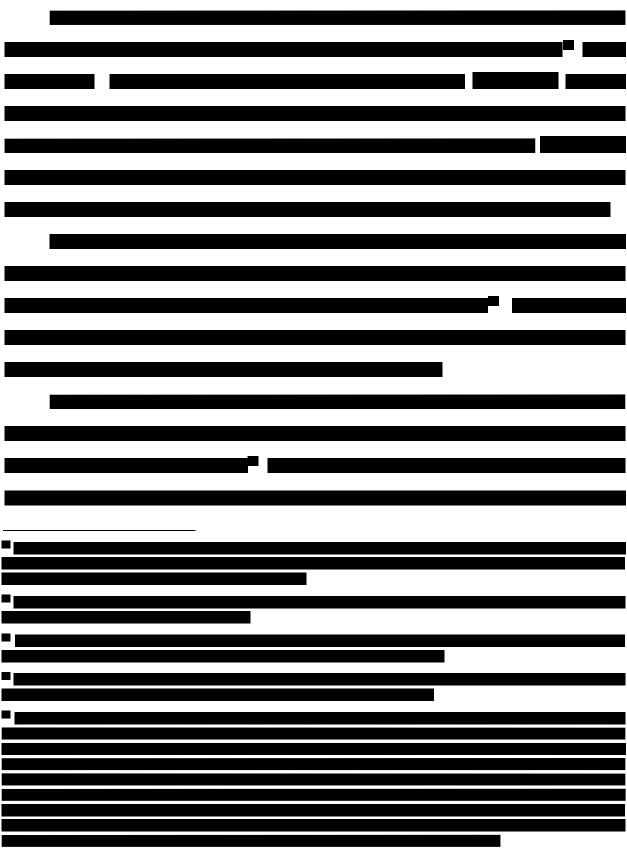
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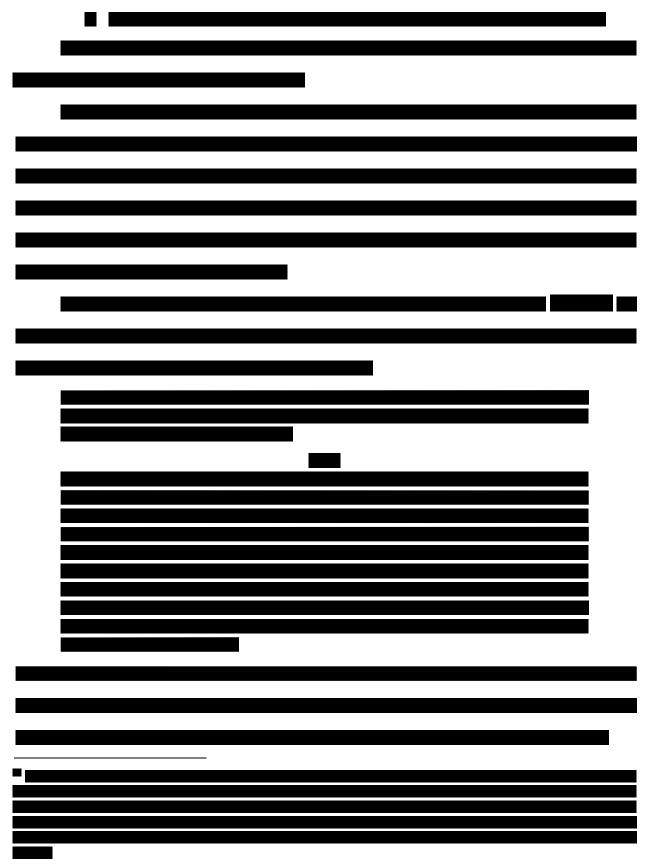
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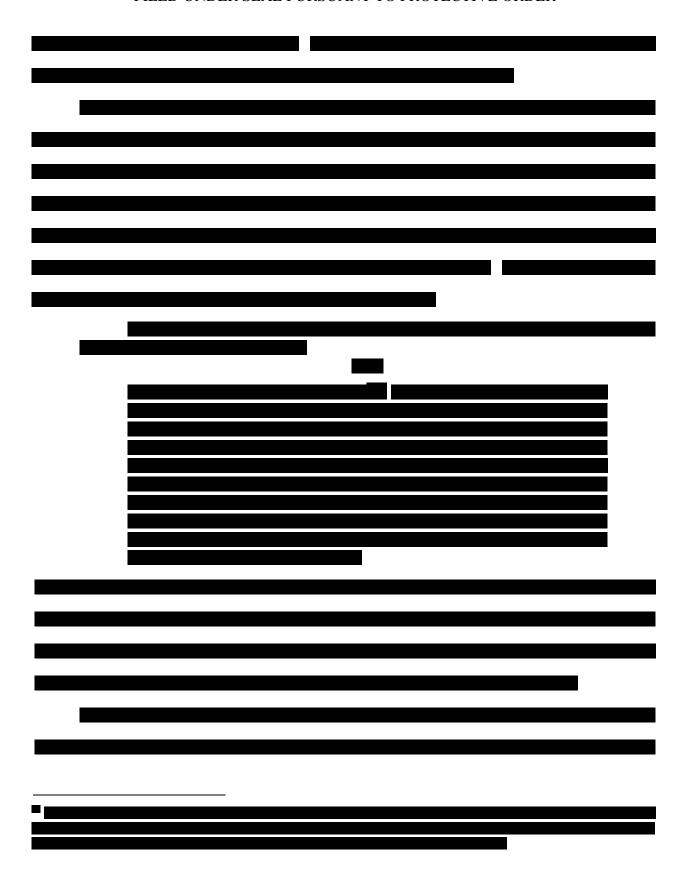


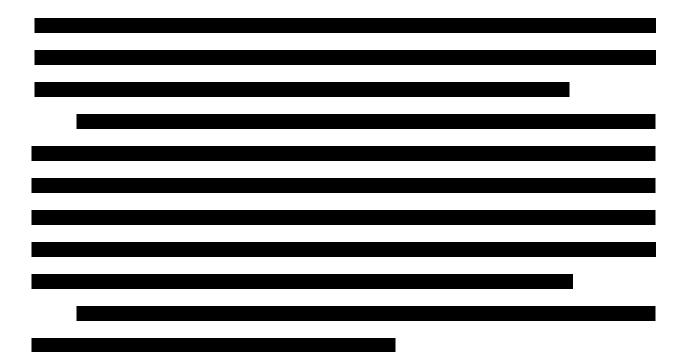
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III. VENUE IS PROPER IN THIS DISTRICT.

Venue is proper in this District because Google has committed acts of infringement here and has a regular and established place of business here.

- A. Google has regular and established places of business in this District.
 - 1. Google's GGC servers (and the place they occupy) are regular and established places of business.

In SEVEN Networks, LLC v. Google LLC, 315 F. Supp. 3d 933 (E.D. Tex. 2017), this Court found Google's GGC servers in this District (and the spacy they occupied) were a regular and established place of business of Google because "(1) Google's business is delivering online content to users, and (2) the GGC servers are part of Google's three-tired network that conducts this very activity." Super Interconnect Techs. LLC v. Google LLC, 2:18-CV-00462-JRG, 2019 WL 3717683, at *2 (E.D. Tex. Aug. 7, 2019) (explaining SEVEN). This Court recognized that Google's GGC servers functioned much like warehouses that Google had integrated into its logistical operations, making them part of its network for delivering content. SEVEN, 315 F. Supp. 3d 933, 960 (E.D. Tex. 2018).

Regarding the November Cases, Google admits the material facts are indistinguishable

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from *SEVEN*¹⁸ but urges this Court abandon *SEVEN*. This Court has already denied Google's request to abandon *SEVEN* and should do so again here. *See Super Interconnect*, 2019 WL 3717683, *1.

The "regular and established place of business" requirement is also satisfied in the
December Cases because GGC servers continue to form a part of Google's three-tiered network
that conducts Google's business of delivering online content to users
1 4: 19 D 1 E 2 7
Lusztig ¹⁹ Decl., Ex. 3 – 7.
There should, however, be an adverse inference
against Google
¹⁸ Richins Decl., Ex. B (excerpt from hearing transcript).
¹⁹ Citations to the Lusztig Decl. refer to a declaration filed on August 16, 2019 with a response brief (the "PMC Brief") in <i>Personalized Media Communications, LLC v. Google</i> , Case No. 2:19-cv-90-JRG. The PMC Brief, along with the Lusztig Decl. and selected exhibits attached to it, are attached as exhibits to Uniloc's response.
²⁰ Richins Decl., Ex. C (Google Dep. (McCallion)) at 36:6-37:1
Lusztig Decl., Ex. Nos. 3 – 7
21 Righing Deal. Fy. C. (Google Dep. (McCallion) et 20:0-12
²¹ Richins Decl., Ex. C (Google Dep. (McCallion) at 29:9-12 (emphasis added).
²² Richins Decl., Ex. D at Bates No. 2014

²³ Lusztig Decl., Ex. 3-7.

A Costco warehouse that is closed for the weekend does not cease to be a regular and established place of business, and Google's GGC servers did not cease to be a regular and established place of business merely because they were "drained".

Even if the GGC servers had not continued to form a part of Google's network after November 23, 2018, it is indisputable that they did so only weeks before the December Cases were filed. Under the venue statue, "venue is properly lodged in the district if the defendant had a regular and established place of business at the time the cause of action accrued and suit is filed with a reasonable time thereafter." Google cites SEVEN for the proposition that venue "is assessed as of the time of filing of the complaint" but SEVEN cites Raytheon, which recognizes a suit filed within a "reasonable time" is sufficient. SEVEN, 315 F. Supp. 3d at 941 n. 7 (citing Raytheon). Rigid application of the rule Google advocates would make the "ultimate determination of whether the Court has venue . . . turn on whether [the plaintiff] had filed its

²⁴ Google filed its original motion to dismiss in the November Cases on April 19, 2019. *See* Dkt. 18 (-491 case). It filed its original motion to dismiss in the December Cases on June 19, 2019. *See* Dkt. 21 (-553 case). On July 5, 2019, Uniloc filed its response to the December Cases motions to dismiss, pointing out that

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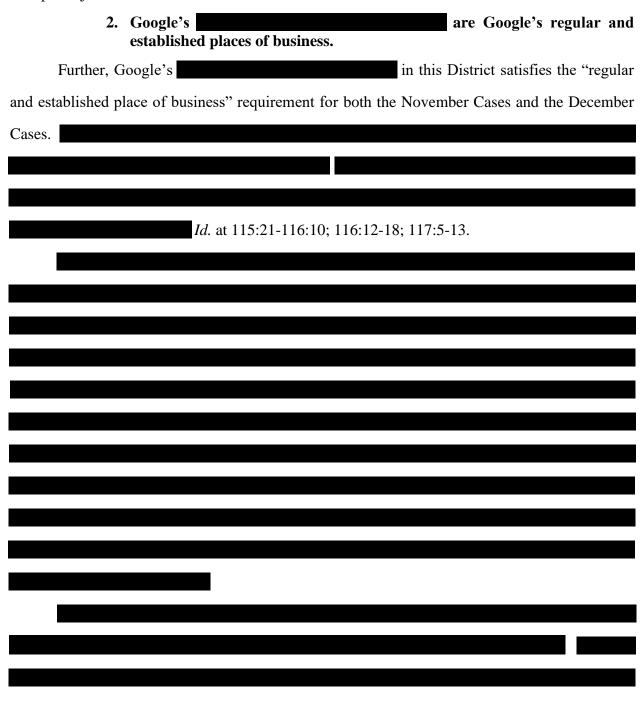
⁵⁵³ case). On July 8, 2019, Uniloc filed a motion to compel in the November Cases, explaining that it has been seeking discovery relating to the GGC servers since May 28, 2019. *See* Dkt. 66 (-491 case). Despite thi

²⁵ Richins Decl., Ex. D at Bates No. 2014

²⁶ Raytheon Co. v. Cray, Inc., 258 F. Supp. 3d 781, 788-89 (E.D. Tex. 2017) (emphasis added), mandamus granted on other grounds, order vacated sub nom (quoting Welch Sci. Co. v. Human Eng'g Inst., Inc., 416 F.2d 32, 35 (7th Cir. 1969), cert. denied, 396 U.S. 1003 (1970); citing San Shoe Trading Corp. v. Converse Inc., 649 F. Supp. 341, 345 (S.D.N.Y. 1986) ("[O]nce a defendant has availed himself of the benefits of doing business in a district, he should not be able to retreat to his home forum simply by closing up shop before plaintiff has an opportunity to file a complaint.") (mandamus granted on other grounds)

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Complaint just two to six weeks earlier."²⁷



²⁷ ParkerVision, Inc. v. Apple Inc., No. 3:15-CV-1477-J-39JRK, 2018 WL 5084731, at *8 (M.D. Fla. Jan. 9, 2018), report and recommendation adopted, No. 3:15-CV-1477-J-39JRK, 2018 WL 5084662 (M.D. Fla. Mar. 8, 2018).

²⁸ *Id.* at 13:18-15:20; *see also* Lusztig Decl., Ex. 8 at 1 ¶ B; Lusztig Decl., Ex. 16 at 15, 19.

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²⁹ *Id.* at 56:16-57:14; *see also* Lusztig Decl., Ex. 9 at 3-5

³⁰ The PMC Brief cites to *the Livingston deposition at* 179:21-80:11 but it appears those pages were inadvertently omitted from Lusztig Decl., Ex. 2. Uniloc will supplement the exhibit if it obtains the complete Livingston Deposition, which Google should have.

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a. Google's of Business".	are "Physical Places
of Business .	
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³¹ <i>Id.</i> at 171:8-17; <i>see also id.</i> at 171:20-172:5 Ex. 10 at 2-3.	
³² Lusztig Decl., Ex. 2 at 32:16-21	
³³ <i>Id.</i> at 66:21-70:9	

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therefore "part of a building set apart
for any purpose or quarters of any kind from which business is conducted." SEVEN, 315 F. Supp.
3d at 951 (quoting <i>In re Cray</i> , 871 F. 3d at 1362). That is particularly true because
sa at 351 (quoting in to citay, 671 1. Sa at 1502). That is particularly true occause
Therefore, and like Google's GGC servers in SEVEN, Google's Eastern
District of Tex are "places" because they are "specifically
localized" and "occupy[] a physical space." SEVEN, 315 F. Supp. 3d at 951.
Also like Google's GGC servers, its
of business because Google exercises exclusive control over them, as well as the portions of the
which are the physical spaces in which they are located and maintained.
First, Google exercises exclusive control over the digital aspects
Its use of both is admittedly exclusive, Google continually monitors the
operation of that equipment, and
sztig Decl., Ex. 8 at ¶ 12.01.
Second, Google exercises exclusive control over the physical
Google admits that it "owns" its in the District and specifically

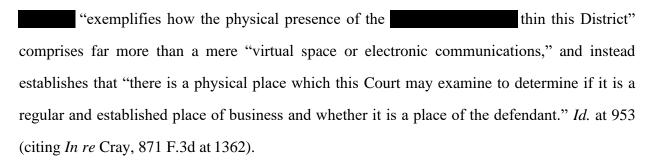
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Like in SEVEN, "[t]his is not a partnership wherein
y independently act on Google's behalf in administering" Google's equipment. Compare
id. (the SEVEN Suddenlink agreement:
th Lusztig Decl., Ex. 8
at 46
In SEVEN, this Court found that "Google's total control over the GGC server's physical
presence within the ISP may be best illustrated" by its Suddenlink Agreement that "requires that
tasks such as the 'physical switching of a toggle switch;' 'power cycling equipment (turning
power on and/or off);' and 'tightening screws, cable ties, or securing cabling to mechanical
connections, plug; may be performed 'only with specific and direct step-by-step instructions
from Google." 315 F. Supp. 3d at 953 (emphasis in original). Here, Google's
Lusztig Decl., Ex. 8 at ¶ 9.08
(emphasis added).
Third, Google exercises exclusive control over the "physical spa
cated and maintained." SEVEN, 315 F. Supp. 3d at
951. Google requires, for example, that

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Where, in SEVEN, ISPs were
"required to provide Google explicit details regarding Google's installation location," 315 F. Supp.
3d at 952, here Google itself mandates
And where, in SEVEN, Google argued that
"Google employees" must be "present" at locations for them to be regular and established places
of business, SEVEN, 315 F. Supp. 3d at 962 n.44, here, Google employees are permitted
See Lusztig Decl., Ex. 2 at 66:21-70:9; Ex. 8 at ¶ 9.10;
Ex. 10 at 2; see also Ex. 2 at 186:8-12
These facts establish even more persuasively than in <i>SEVEN</i> the "installation of Google's
own" equipment in a "physical space that becomes Google's." SEVEN, 315 F. Supp. 3d at 952
(emphasis in original). While this Court analogized Google's GGC servers to "local data
warehouses, much like a shoe manufacturer might have warehouses around the country," id. at
948, Google's
is in "the business of providing," id., to travel
seamlessly around the country, including to and through the Eastern District of Texas. Cf. Kibler
v. Transcon. & W. Air, 63 F. Supp. 724, 726 (E.D.N.Y. 1945) (opining, under a different statute
that, "a railroad is a resident of every county where it operates, where it has a place of business,
where it runs, where it owns property and runs its road, [and] through which its line passes")
(quotations omitted).

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Google's are therefore installed "physical structure[s]" from which "the business of Google is carried out." *SEVEN*, 315 F. Supp. 3d at 958. Accordingly, they are places of business under § 1400(b).

b. Google's are "Regular and Established".

The Federal Circuit has explained that a "regular" place of business is "operate[d] in a "steady, uniform, orderly, and methodical" manner[.]" *In re Cray*, 871 F. 3d at 1362 (citations and alterations omitted). In other words, a business is "regular" if it is not "sporadic," like "a <u>series</u> of [business] acts" is not sporadic. *Id.* (emphasis added). A business is "established" where it is "settled certainly, or fixed permanently." *Id.* at 1363 (citations and alterations omitted).



22:1; Ex. 8 at 2; Ex. 9 at ¶ 1.

Where "[t]here is little question that Google intends" its Eastern District of Tex to be a "long term solution," and "it is undisputed that they have been such a solution in this District for years," *SEVEN*, 315 F. Supp. 3d at 958, they are regular and established under § 1400(b).

c. Google's are "of Google".

A defendant must "establish or ratify the place of business" in order for it to be a place "of the defendant." *In re Cray*, 871 F.3d at 1363. Here, Google has both established <u>and</u> ratified its

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Eastern District of Texas
As explained above, "[t]here is little doubt that," where Google, for example,
"and the physical
location in and at which it resides [are] under the exclusive control of Google." SEVEN, 315 F.
Supp. 3d at 965. Moreove
3. Google's is a regular and established place of business.
The "regular and established place of business" requirement is also satisfied by
meets the statutory definition to be Google's regular and established place
of business.
³⁴ See e.g., Lusztig Decl., Ex. 2 at 46:17-21
³⁵ See Tinnus Enterprises, LLC v. Telebrands Corp., No. 6:17-CV-00170-RWS, 2018 WL 4560742, at *4 (E.D. Tex. Mar. 9, 2018) (where Defendants "lease shelf space in this District," and "retain[] and pay[] agents" to physically maintain Defendants' products" in that space, Defendants "conducts business in such a way in this District that venue is proper"), report and recommendation adopted, No. 6:17-CV-00170-RWS, 2018 WL 4524119 (E.D. Tex. May 1, 2018).
³⁶ See Lusztig Decl., Ex. 17

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37 7 1 4 2 4 2
³⁷ Id.; see also id. at 42
38 G J D J E . 10 242 14 20
³⁸ See Lusztig Decl., Ex. 18 at 242:14-20

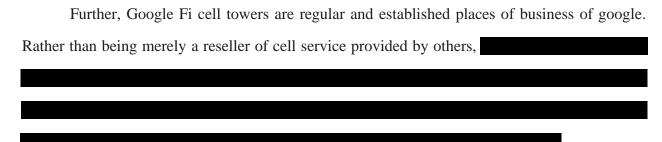
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Google even "holds out for its business," <i>In re Cray Inc.</i> ,
871 F.3d at 1363,
671 1.5d at 1303,
Lusztig Decl, Ex. 18 at 254:20-55:20; 256:5-12; 257:8-58:12.
"There is no question that warehouses are properly considered places of business and have
been so held, by both legislatures and courts." SEVEN, 315 F. Supp. 3d at 958 (citing cases and
statutes). Where Google
"integrate[d] into
[Google's] own logistical operations [and is a] place[] of business[.]" <i>Id.</i> (citing <i>Smith v</i> .
Farbenfabriken of Elberfeld Co., 203 F. 476, 479–81 (6th Cir. 1913)); see also In re ZTE (USA)
Inc., 890 F.3d 1008, 1015 (Fed. Cir. 2018) (finding whether defendant "owns any of the equipment
39 See also Lugatio Deal. Ev. 19 et 222 24.
³⁹ See also Lusztig Decl., Ex. 18 at 233-34:
⁴⁰ Lusztig Decl., Ex. 18 at 152:10-16
⁴¹ Lusztig Decl., Ex. 17 at p. 42
⁴² Lusztig Decl., Ex. 18 at 250:17-51:4
⁴³ See id. at 167:21- 68:11; 170:5-17; 187:15-18
44 See Lusztig Dec. Ex. 19 ("Get your Pixel phone repaired") at 2 (emphasis added),

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located there" and whether the contractor "would need permission from [defendant] to move its [operations] outside of the Eastern District of Texas" to be relevant factors under § 1400(b)).

4. Google Fi cell towers are regular and established places of business of Google.



Also, the Google Fi cell service coverage Google provides to users in this district is not the same as any other service provider. Rather, as described in Uniloc's complaint (and Google does not dispute), Google chooses which cell tower it believes is best for a particular user at a particular time.

us, Google advertises an enhanced network coverage area better than any of the companies that it uses. Google also determines whether, for example, one of its Pixel phone connected to Wi-Fi network in this district could be better serviced by a phone call over Wi-Fi as opposed to the cell tower. *See* Complaints.

5. The statute does not require "nexus" between acts of infringement and the regular and established place of business.

Finally, this Court has already rejected Google's claim that the statute requires "nexus" between acts of infringement and the regular and established place of business. *SEVEN*, 315 F. Supp. 3d at 945 ("Nothing in the language of Section 1400(b) justifies the conclusion that a defendant's place of business in the district must have some connection with the accused device.").

B. Uniloc's complaints allege acts of infringement in this District.

Further, contrary to Google's claims, the complaints in the 491, 492, 495, 497, 500, 503, 504, 550, 551, and 553 cases plausibly allege acts of infringement in this District.

1. Pre-suit knowledge is not required.

In each motion alleging Uniloc failed to allege acts of infringement in this District, Google argues pre-suit knowledge is necessary for induced or contributory infringement. In each case, this argument fails because pre-suit knowledge is not necessary for induced or contributory infringement. *See Tierra Intelectual Borinquen, Inc. v. ASUS Computer Int'l, Inc.*, 2:13-CV-44-JRG, 2014 WL 1233040, at *2 (E.D. Tex. Mar. 24, 2014).

Google had knowledge at the time the complaints were filed. *Achates Reference Pub., Inc. v. Symantec Corp.*, 2:11-CV-294-JRG-RSP, 2013 WL 693955, at *3 (E.D. Tex. Jan. 10, 2013), report and recommendation adopted, 2:11-CV-294-JRG-RSP, 2013 WL 693885 (E.D. Tex. Feb. 26, 2013) ("Symantec has had knowledge of the patent, as well as knowledge that the use of the activation component infringes the asserted patents, since at least the time of the filing of the Complaint."). This is sufficient to establish Google committed acts of infringement for purposes of venue.

2. Google had pre-suit knowledge.

With respect to the November Cases, Google's argument also fails because Google cannot dispute it had knowledge at the time the complaints were filed. For each of the complaints Google challenges, a nearly identical complaint was filed weeks before (and later voluntarily dismissed). Because the filing of the earlier, identical, complaints gave Google pre-suit knowledge, Google cannot plausibly deny (and does not deny) pre-suit knowledge.

3. Google erroneously assumes all alleged infringing activity must have occurred in this District.

In each motion alleging Uniloc failed to allege acts of infringement in this District, Google attempts to sidestep undisputed allegations in the complaint by alleging one part of the infringing activity does not occur in this district. Google appears to again be making an argument rejected by this Court in *SEVEN* – that Uniloc 2017 must allege Google alone performs each step of the alleged infringement in this District. This exact argument has been rejected by the courts, including this one: "Contrary to Plaintiff's argument, not all of the alleged infringing activity needs

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to have occurred within [the District] so long as some act of infringement took place there." *SEVEN*, 315 F. Supp. 3d at 943.

Each of the complaints alleges use of the accused products in this District. Google does not (and cannot) dispute that the accused products are used here and instead alleges that certain equipment or components that support the accused products might be located outside of this District. This is irrelevant so long as part of the infringing activity occurred here, which Uniloc alleges and Google cannot dispute. Google likewise does not dispute that it instructs EDTX users on how they can use these services or how they can benefit from using these services, as alleged in the complaints.

Google's allegation that one should simply ignore where the information is obtained (here, EDTX residents) and to where it goes (here, EDTX) is analogous to arguments rejected in other contexts under 35 USC 271 (f) and (g) where one might seek to escape infringement by crossing international boundaries. Here, the content is obtained from the EDTX and the content is delivered to devices in the EDTX.

CONCLUSION

For the foregoing reasons, Google's motions to dismiss should be denied.

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Dated: November 8, 2019 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon all counsel of record via the Court's CM/ECF electronic filing system in accordance with the Federal Rules of Civil Procedure on November 8, 2019.

/s/ Ryan S. Loveless
Ryan S. Loveless

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CERTIFICATE OF FILING UNDER SEAL

I certify that this motion was filed under seal pursuant to the protective order entered in each respective case.

/s/ Ryan S. Loveless
Ryan S. Loveless